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IN THE COURT OF APPEALS OF INDIANA

RXSD ENTERPRISES, INC.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 44A03-0606-CV-284
	)	
GASOLINE EQUIPMENT SERVICE CO.,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAGRANGE SUPERIOR COURT
The Honorable George E. Brown, Judge
Cause No. 44D01-0209-PL-11

May 2, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

RXSD Enterprises, Inc. ("RXSD") appeals the trial court's judgment awarding damages to

Gasoline Equipment Service Company ("GESC"). RXSD raises a several issues on appeal of which the following is dispositive: was the general judgment awarding damages to GESC clearly erroneous.

We reverse.

FACTS AND PROCEDURAL HISTORY

In early 2002, RXSD, through its general contractor, A-1 Construction ("A-1"), solicited bids for the demolition and reconstruction of two service stations along the Indiana Toll Road in LaGrange County, Indiana. The Indiana Department of Transportation hired RXSD to complete the stations by Memorial Day weekend of 2002.

RXSD originally procured a total project bid from DRW, in the amount of $303,360 per station. RXSD also intended to receive bids from GESC and B&B Equipment ("B&B"); however, because of the project's time constraints, GESC and B&B indicated that they would not be able to meet the Memorial Day deadline unless they worked together. RXSD agreed and allowed the two companies to make a combined bid for the total project. RXSD emphasized that everything must be included in the bid and that if anything was to be added, it must be approved to secure appropriate financing.

GESC submitted a bid consisting of six different proposals, each of which included a contract on the reverse side. The contract terms included a merger clause, which provided:

> 12. **ENTIRE AGREEMENT.** The contract between the owner and the contract[or] [sic], upon acceptance, shall consist of this proposal, including these general terms and conditions and designated plans and specifications describing the work for which the proposal is given plus such other contract documents as may be submitted to and approved in writing by the contractor. Such contract represents the entire agreement between the parties and supersedes all prior negotiations and agreements. These general terms and

> conditions shall govern in the event of any conflicting term of any other contract document.

Appellant's App. at 53.

RXSD agreed to the bid submitted by GESC and then later agreed to B&B's portion of the work. Ultimately, RXSD accepted GESC's and B&B's combined bid equal to $287,659.86 per station and turned down DRW's bid. None of GESC's six proposals contained the electrical work necessary for the station, but B&B's bid include the following language: "[GESC] to quote canopy, New Dispensers and Electrical." During this time, GESC submitted a bid to B&B for electrical equal to $64,500 per station, but neither GESC nor B&B sent that bid proposal to RXSD. As the project neared completion, RXSD and A-1 became aware of an issue since its finances for the project were insufficient to satisfy GESC's bills submitted for its portion of the work. A-1, RXSD, and GESC met to discuss the growing problem. At that meeting, GESC admitted that it had not previously billed approximately $64,500 for the electrical work necessary in each station. *Tr.* at 23. A-1 and RXSD refused to pay GESC for the electrical work and GESC, as a result, refused to sign a lien waiver on the project. GESC brought this suit to recover the damages for the unpaid electrical work. The trial court rendered a judgment in favor of GESC and against RXSD in the amount of $110,000 plus costs. RXSD now appeals.

DISCUSSION AND DECISION

RXSD claims that the trial court's judgment is clearly erroneous because it is not

supported by any legal theory.[1] In its complaint, GESC alleged both implied[2] and express theories of contract entitled it to relief; RXSD contends neither support the judgment.

This court's standard of review is controlled by Indiana Trial Rule 52(A) stating:

> [o]n appeal of claims tried by the court without a jury . . . , at law or in equity, the court on appeal shall not set aside the findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

Here, the trial court entered a general judgment. When the trial court does not enter specific findings of fact or conclusions, this court will affirm the judgment if it can be sustained on any theory of law or equity supported by the evidence. *Perdue Farms, Inc. v. Pryor*, 683 N.E.2d 239, 240 (Ind. 1997). This court will look only to evidence and reasonable inferences therefrom which tend to support the trial court's decision. *Kincaid v. Lazar*, 405 N.E.2d 615, 618 (Ind. Ct. App. 1980). Thus, the trial court's judgment will be clearly erroneous if it is not supported by any theory of relief.

GESC's complaint stated that it was entitled to relief based on the express contract detailed on the back of their bid proposal, or if there was no express contract, then on an equitable theory of implied contract. "The existence of a valid express contract for services, however, precludes implication of a contract covering the same subject matter." *Id.* at 619. This is because a party cannot recover in equity "when there is a remedy at law." *Town of*

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[1] RXSD submits that the trial court awarded GESC damages based on a quasi-contractual theory of unjust enrichment, or quantum meruit; but, nothing in the trial court's judgment, specifically: "[a]fter considering the evidence and the arguments presented, the Court now finds for the Plaintiff and against the Defendant, RXSD, . . . and assesses Plaintiff's damages at $110,000.00" may be taken as indicating the same.

[2] GESC argues both quantum meruit and implied contract. These theories are one in the same. *See Town of New Ross v. Ferretti*, 815 N.E.2d 162, 168 (Ind. Ct. App. 2004) ("quantum meriut – also referred to as unjust enrichment, contract implied-in-law, constructive contract, or quasi–contract . . .").

New Ross v. Ferretti, 815 N.E.2d 162, 168 (Ind. Ct. App. 2004). Here, the bid proposals, which were drafted by GESC and contained language on the back of each bid proposal form, collectively constituted an express contract between the parties.

Once an express contract exists covering the subject matter in dispute, we must determine as a matter of law whether the language is ambiguous or not. *Mid-State Gen. & Mech. Contracting Corp. v. Town of Goodland*, 811 N.E.2d 425, 431 (Ind. Ct. App. 2004) ("*Ambiguity of Bid Documents*"). This court should use the language of the express contract as a whole to ascertain the intent of the parties. *Id*. If the language is unambiguous, the contract is the only evidence available to resolve the conflict. *Id.* However, if the language is ambiguous the fact finder must look to extrinsic evidence to interpret the intent of the parties. *McLinden v. Coco*, 765 N.E.2d 606, 612 (Ind. Ct. App. 2002). Construing the terms of a written contract is a pure question of law for the court, and, thus, we conduct *de novo* review. *Grandview Lot Owners Ass'n v. Harmon*, 754 N.E.2d 554, 557 (Ind. Ct. App. 2002).

"A contract is ambiguous when it is susceptible to more than one interpretation and reasonably intelligent persons would honestly differ as to its meaning." *Mid-State Gen.*, 811 N.E.2d at 431. Here, the contract's express language does not specify nor can we ascertain from its words alone what the parties' intended with the term completion of the project. As such, the fact-finder, in this case, the trial court, had to consider extrinsic evidence available on the record. To grant damages for completion of the electrical, the trial court would have had to find that the parties intended for the electrical work to be separate. However, there is no evidence in the record before us to suggest that the parties intended anything other than

GESC and B&B would submit an all-inclusive bid for the total cost of construction of two service stations. It was the responsibility of GESC to include all the expenses it required to complete the project. *Id.* at 432 ("the allowances were clearly to be included in the 'total lump sum bid price'")[3]; *cf. Schindler Elevator Corp. v. Metro. Dev. Com'n*, 641 N.E.2d 653, 657 (Ind. 1994) ("In order for bid on public work contract to be responsive . . . , bid must conform substantially to those specifications set forth in the invitation to bid"). Among those expenses was $64,500 worth of electrical work, which GESC admitted it failed to include in the proposal. *Tr.* at 23.[4]

The trial court's judgment was clearly erroneous because no theory of law provides relief.

Reversed.

RILEY, J., and FRIEDLANDER, J., concur.

[3] This court in *Mid-State Gen. & Mech. Contracting Corp. v. Town of Goodland*, 811 N.E.2d 425, 431 (Ind. Ct. App. 2004), held that there was an express contract and that it had unambiguous language that spelled out the intent of the parties and required the subcontractor to bid a "Contract Sum." This case is distinguished from *Mid-State Gen.* because there was no language in the contract available for us ascertain the intent of the parties.

[4] GESC/B&B's bid was only 6.7% less than the next closet bid, DRW's bid. There was no evidence to support the conclusion that RXSD should have anticipated GESC's gross miscalculation, and thereby effectuated a misrepresentation. *Mid-State Gen. & Mech. Contracting Corp. v. Town of Goodland*, 811 N.E.2d 425, 435 (Ind. Ct. App. 2004) (contract may not be avoided for unilateral mistake unless mistake was induced by misrepresentation of opposite party).